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McKESSON CORPORATION  
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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN FRANCISCO DIVISION  
11

12 SHERRI KELLERMAN;

13 Plaintiff,

14 v.

15 BAYER HEALTHCARE  
16 PHARMACEUTICALS, INC.; MERCK &  
CO., INC.; SCHERING CORPORATION; and  
MCKESSON CORPORATION;

17 Defendants.  
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Case No. 3:14-cv-03680-WHA

**DEFENDANT MCKESSON  
CORPORATION'S NOTICE OF MOTION  
AND MOTION TO DISMISS  
PLAINTIFF'S COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Date: January 8, 2015

Time: 8:00 a.m.

Crtrm: 8, 19<sup>th</sup> Floor

Judge: The Honorable William Alsup

Date Action Filed: August 14, 2014

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PLEASE TAKE NOTICE that on January 8, 2015, Defendant McKesson Corporation will and hereby does move to dismiss the Sixth, Seventh and Eighth Causes of Action of Plaintiff's Complaint pursuant to Rules 12(b)(6) and 9(b) for failure to state fraud claims with particularity.

This Motion will be based on this Notice, the accompanying Memorandum of Points and Authorities concurrently filed herewith, the pleadings and papers on file with the Court, and such other evidence and argument as may be presented at the hearing.

MORRISON & FOERSTER LLP

Attorneys for Defendant  
McKESSON CORPORATION

1           **I.       INTRODUCTION**

2           McKesson Corporation (“McKesson”) distributes products for numerous pharmaceutical  
3 companies across the United States. As a distributor, McKesson’s role is limited to ensuring that  
4 finished, labeled pharmaceutical products such as the Avelox at issue in this matter make it from  
5 the drug manufacturer to patient-facing entities such as pharmacies and hospitals. McKesson is  
6 not in the business of labeling Avelox or promoting Avelox to patients or doctors.

7           Despite McKesson’s limited role as a distributor of Avelox, Plaintiff lumps McKesson  
8 with all the other defendants in making vague claims of fraud and negligent misrepresentation  
9 that allegedly caused her injuries. Because these general allegations fail to meet heightened  
10 federal pleading requirements for fraud claims, Plaintiff’s Sixth, Seventh, and Eighth Causes of  
11 Action should be dismissed.

12           **II.       PLAINTIFF’S COMPLAINT**

13           According to Plaintiff’s Complaint, McKesson is “the largest pharmaceutical distributor in  
14 North America.” (Compl. ¶ 22.) “Avelox is a broad spectrum synthetic antibacterial agent  
15 manufactured by Bayer and marketed and sold in the United States . . . by . . . Merck.” (*Id.* ¶ 38.)  
16 Plaintiff alleges that McKesson was a distributor of Avelox. (*Id.* ¶ 24.)

17           Plaintiff brings eight causes of action against all Defendants alleging injury from taking  
18 Avelox. These causes of action include Fraud (Sixth Cause of Action), Negligent  
19 Misrepresentation (Seventh Cause of Action), and Fraudulent Concealment (Eighth Cause of  
20 Action) (collectively, the “fraud-based claims”). These fraud-based claims make repeated  
21 allegations regarding all “Defendants” without identifying any particular statement,  
22 misrepresentation, or omission made by McKesson. (*See generally* Compl.) Nor does the  
23 Complaint specify the time, place, or manner of any statements made by these “Defendants.”  
24 (*Id.*)

25           **III.       ARGUMENT**

26           Plaintiff’s claims for fraud, negligent misrepresentation, and fraudulent concealment  
27 should be dismissed against McKesson because they lack the specificity required for fraud-based  
28 claims. Rule 9(b) requires a complaint to state “with particularity the circumstances constituting”

1 the fraud. Fed. R. Civ. P. 9(b). This means Plaintiff must allege the time, date, place, and content  
2 of each fraudulent statement, and explain, in detail, why each statement was false at the time it  
3 was made. *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007).

4 In the Ninth Circuit, it is well-established “that both claims for fraud and negligent  
5 misrepresentation must meet Rule 9(b)’s particularity requirements.” *Neilson v. Union Bank of*  
6 *Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003). The pleading must be “specific enough  
7 to give defendants notice of the particular misconduct . . . so that they can defend against the  
8 charge and not just deny that they have done anything wrong.” *Vess v. Ciba-Geigy Corp. USA*,  
9 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation omitted). Moreover, “Rule 9(b) does not  
10 allow a complaint to merely lump multiple defendants together but requires plaintiffs to  
11 differentiate their allegations when suing more than one defendant . . . and inform each defendant  
12 separately of the allegations surrounding his alleged participation in the fraud.” *Swartz*, 476 F.3d  
13 at 764 (internal quotations, brackets, and citation omitted). *See also Lancaster Cmty. Hosp. v.*  
14 *Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th Cir. 1991) (plaintiff must plead with  
15 particularity “the role of each defendant in each scheme”). Plaintiff’s fraud-based claims fall  
16 short of this heightened standard and should be dismissed.

17 The five elements of fraud are: “(a) misrepresentation (false representation, concealment,  
18 or nondisclosure); (b) knowledge of falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce  
19 reliance; (d) justifiable reliance; and (e) resulting damage.” *Small v. Fritz Cos.*, 30 Cal. 4th 167,  
20 173 (2003) (quoting *Lazar v. Super. Ct.*, 12 Cal. 4th 631, 638 (1996)); *Philipson & Simon v.*  
21 *Gulsvig*, 154 Cal. App. 4th 347, 363 (2007).<sup>1</sup> Negligent misrepresentation shares the same  
22 elements except it does not require intent to defraud. *See OCM Principal Opportunities Fund*  
23 *L.P. v. CIBC World Markets Corp.*, 157 Cal. App. 4th 835, 845 (2007), as modified (Dec. 26,  
24 2007).

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25 <sup>1</sup> Under Tennessee law fraud consists of four elements: “(1) an intentional misrepresentation of a  
26 material fact, (2) knowledge of the representation’s falsity, [] (3) an injury caused by reasonable  
27 reliance on the representation . . . [and (4)] that the misrepresentation involve a past or existing  
28 fact . . . .” *Dobbs v. Guenther*, 846 S.W.2d 270, 274 (Tenn. Ct. App. 1992) (citations omitted).

1 Plaintiff's allegations fail to meet these heightened pleading requirements. Not once does  
2 Plaintiff specify a statement or omission attributable to McKesson. (*See generally* Compl.)  
3 Instead, Plaintiff repeatedly makes allegations regarding all "Defendants" in attempting to state  
4 her fraud-based claims. For example:

- 5 • "Defendants misrepresented . . . ." (Compl. ¶ 112);
- 6 • "Defendants made misrepresentations . . . ." (*id.* ¶ 113); and
- 7 • "Defendants knew or should have known that these representations were  
8 false . . . ." (*id.* ¶ 115).

9 Throughout Plaintiff's fraud-based claims (*id.* ¶¶ 111-139) she continues to consistently  
10 attribute statements and omissions to all "Defendants." This is insufficient as these allegations  
11 fail to "inform each defendant separately of the allegations surrounding his alleged participation  
12 in the fraud." *Swartz*, 476 F.3d at 764-65. On this basis alone Plaintiff's fraud-based claims  
13 should be dismissed.

14 The Central District of California dismissed a plaintiff's fraud claims under similar  
15 circumstances. *Sherman v. Stryker Corp.*, No. SACV 09-224 JVS (ANX), 2009 WL 2241664  
16 (C.D. Cal. Mar. 30, 2009). There, like here, the plaintiff sued multiple defendants in a product  
17 liability case and alleged fraud. *Id.* at \*1. Even though the plaintiff argued she pled all of the  
18 elements of her fraud-based claim, the court found this insufficient:

19 But the issue is not whether [plaintiff] has pled all the elements of  
20 negligent misrepresentation, but whether she has done so with the  
21 requisite specificity. The Court finds that she has not. Aside from  
22 making allegations against the defendants in general, rather than  
23 any defendant in particular, [plaintiff] fails to specify who made the  
alleged representation, when the representation was made, where  
the representation was made, or how the representation was  
communicated.

24 *Id.* at \*2. Just as in *Sherman*, Plaintiff here has not only lumped together multiple defendants, but  
25 has also failed to "specify who made the alleged representation, when the representation was  
26 made, where the representation was made, or how the representation was communicated."  
27 Without this information, Plaintiff has not given McKesson sufficient "notice of the particular  
28 misconduct . . . so that [it] can defend against the charge . . . ." *Vess*, 317 F.3d at 1106.

1 Finally, Plaintiff cannot amend her Complaint to state fraud-based claims against  
2 McKesson with particularity, as McKesson was a distributor and not a marketer of Avelox.  
3 (Compl. ¶¶ 36, 38.) Accordingly, Plaintiff's fraud-based claims should be dismissed against  
4 McKesson, without leave to amend.

5 **IV. CONCLUSION**

6 Plaintiff's fraud-based claims lack essential allegations, rendering the claims fatally  
7 defective. Plaintiff could not state her fraud-based claims against McKesson even if granted  
8 leave to amend. For these reasons, McKesson respectfully requests that the Court dismiss with  
9 prejudice the Sixth, Seventh, and Eighth Causes of Action in Plaintiff's Complaint.

10 Dated: September 29, 2014

MORRISON & FOERSTER LLP

11  
12 By: /s/Erin M. Bosman  
13 ERIN M. BOSMAN

14 Attorneys for Defendant  
15 McKESSON CORPORATION  
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